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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOHN GABOR, KAY GABOR,

Plaintiffs,

v.

UNITED STATES OF AMERICA, ET
AL.

Defendants.

CASE NO. C07 06091 RW

**NOTICE OF MOTION; MOTION TO
DISMISS FIRST AMENDED
COMPLAINT; MOTION FOR AWARD OF
COSTS, FEES AND OTHER RELIEF
PURSUANT TO 42 U.S.C. § 1988;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 23, 2008

Time: 9:00 a.m.

Place: Ctr. 4, 4th Floor

Judge: The Ronald M. Whyte

Date Action Filed: December 3, 2007

Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 23, 2008 at 9:00 a.m. or as soon thereafter
as counsel may be heard before the Honorable Ronald Whyte, United States District Judge, in
Courtroom 4 of the above entitled court, located at 230 South First Street, San Jose, California
95113, defendant Bradley A. Solomon will hereby and does move this court for an order under
Federal Rules of Civil Procedure, Rule 12 (b), to dismiss this action on the grounds that the First
Amended Complaint fails to state a claim against defendant Bradley A. Solomon upon which
relief can be granted, in that:

1 a. Plaintiffs' claims under § 1983 do not state an actionable constitutional or federal
2 claim;

3 b.. The claim against Deputy Attorney General Bradley Solomon is barred by
4 absolute quasi-judicial immunity.

5 WHEREFORE, defendant Bradley A. Solomon prays that the motion be granted and the
6 first amended complaint and the action be dismissed with prejudice.

7 Moreover, in view of the *pro per* plaintiffs' bad faith conduct in bringing this action, this
8 defendant requests that the Court issue an order awarding him his costs and fees and preclude
9 plaintiffs from filing any further actions in this Court until such time as the costs and fees sought
10 herein are paid, and/or an appropriate bond is posted.

11 This motion is and shall be based upon this notice of motion and motion to dismiss, the
12 accompanying memorandum of points and authorities, the pleadings and papers on file herein,
13 and such oral or written material as may be presented at the hearing of this motion.

14

15 Dated: April 16, 2008

16 EDMUND G. BROWN JR., Attorney General
17 of the State of California
18 PAUL T. HAMMERNESS
19 Supervising Deputy Attorney General
20 KAY K. YU
21 Deputy Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES**PRELIMINARY STATEMENT****A. Nature of this Action; Plaintiffs' Claims**

This is an action for damages and other relief brought by *pro per* plaintiffs John Gabor and Kay Gabor pursuant to 42 U.S.C. § 1983. This case arises out of plaintiffs' prior unsuccessful lawsuit against the City of Campbell, the City of Campbell Community Development Department, the County of Santa Clara Board of Supervisors and their respective employees, and several other individuals. Plaintiffs' suit was dismissed with prejudice. Plaintiffs bring this action against all of the attorneys who represented the various parties in the prior action. In addition, two court clerks of the United States District Court were also named as defendants.

1. Procedural Background

Prior to filing the current complaint, plaintiffs filed a complaint against the following defendants: Santa Clara County Board of Supervisors, represented by Marcy Berkman. The City of Campbell and the City of Campbell Community Development Department, Daniel Rich, City Manager of the City of Campbell and Susan Morgado-Gray, an employee of the City of Campbell represented by Timothy James Schmal and Burleigh E. Sabin of the law firm of Burton, Volkmann & Schmal, LLP. Scott N. Schools, The United States Attorney for the Northern District of California represented by James A. Scharf. Edmund G. Brown Jr., Attorney General for the State of California represented by Bradley A. Solomon, Deputy Attorney General.

In summary, the complaint alleged conspiracy between the various municipal defendants to violate plaintiffs' civil rights. Further, plaintiffs alleged that the United States Attorney and the Attorney General of California failed to protect plaintiffs from these municipal defendants. A stipulation was entered dismissing the California Attorney General. The remaining served defendants filed motions to dismiss. Plaintiffs objected to the motions to dismiss on the grounds that the only permissible response to their complaint was an answer. Additionally,

1 plaintiffs failed to file any opposition to the motions to dismiss. The complaint was dismissed
2 on March 31, 2008.

3 Before the lawsuit was resolved, plaintiffs filed this complaint against all the attorneys
4 who represented the defendants on December 3, 2007. It is this complaint which is now before
5 the Court. An amended complaint was filed March 14, 2008. Named as defendants are the
6 following: the United States of Amercia, Michael Mucasey (United States Attorney General),
7 Administrative Office of the United States District Court, James A. Scharf (United States
8 Deputy Attorney General), Marcy Berkman, Timothy James Schmal, Burleight E. Sabin,
9 Burton, Volkmann & Schmal, LLP, Bradley A. Solomon and United States District Court of
10 California court clerks D. Miyashiro and Jackie Garcia.

11 The complaint alleges that all the defendants conspired with the Northern District Court
12 of California and its judicial officers to deprive plaintiffs of their right to trial. Plaintiffs have
13 failed to effect service of process on any of the defendants.

14 **B. Grounds For This Motion**

15 Plaintiffs' § 1983 claims of conspiracy and due process violations are wholly conclusory
16 and fanciful. Plaintiffs have failed to state facts to state a claim for a due process violation. The
17 allegations in the first amended complaint assert claims against Deputy Attorney General,
18 Bradley A. Solomon for his conduct in representing the Attorney General of the State of
19 California in *Gabor v. County of Santa Clara Board of Supervisors, et al.* Absolute quasi-
20 immunity bars such claims against him.

21 **ARGUMENT**

22 **I.**

23 **PLAINTIFFS HAVE FAILED TO STATE A CLAIM**
24 **FOR A 42 U.S.C SECTION 1983 VIOLATION**

25 Plaintiffs have alleged, in wholly conclusory terms, that defendant Bradley Solomon was
26 a participant in an unlawful conspiracy to deprive him of his right to a trial, no specific factual
27 allegations are made to support this claim. The only mention of defendant is paragraph 31 of
28 the amended complaint. It states as follows:

"On September 6, 2007, defendant Bradley Solomon filed docket entry 15, no appearance form, or compliance with Rule 5(a), after calling the Gabors home to threaten [sic] that they would be arrested and lose their home if they did not sign the "stipulation" to dismiss their claims against Attorney General Brown Jr., knowing that California Civil Code § 52.1 require defendant Brown to prosecute the wrongdoers for 'conduct alleged in complaint'".

Even if such a statement was true, it does not state facts to state a claim under 42 U.S.C. § 1983. The alleged conduct by defendant Bradley A. Solomon did not deprive plaintiffs' due process rights. Plaintiffs could have easily refused to sign the stipulation or objected to and withdrawn their agreement to the stipulation. However, plaintiffs did nothing after the stipulation was filed on September 6, 2007.

Plaintiffs have failed to state facts to state a claim against defendant Bradley A. Solomon.

II.

THE ATTORNEY GENERAL'S SUBORDINATES ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983

Plaintiffs bring this lawsuit against defendant Bradley A. Solomon on the grounds that he allegedly coerced them into signing the stipulation to dismiss Edmund G. Brown Jr., the Attorney General, from the complaint.

Defendant Bradley A. Solomon is entitled to absolute immunity because the alleged conduct was taken in connection with the judicial process. *Fry v. Melarango*, 939 F.2d 832, 836 (9th Cir. 1991) (government attorneys immune for acts during the judicial phase of litigation; *Flood v. Harrington*, 532 F.2d 1248, 1250-52 (9th Cir. 1978) (same). As the Ninth Circuit noted in *Flood*:

[424 U.S.409 (1976)]

"In *Imbler v. Pachtman*, the Supreme Court held that state prosecutors are absolutely immune from civil suit under 42 U.S.C. § 1983 for damages allegedly caused by the initiation of prosecution and the presentation of the state's case. *U.S. at 44 U.S.L.W. at 4257*. The Court applied its rule of absolute immunity to protect only that prosecutorial conduct 'intimately

1 associated with the judicial phase of the criminal process." *Id.* at
2 430, 96 S.Ct. at 995, 47 L.Ed. 2d 128, U.S.L.W. at 4256.

3 While *Imbler* involved an underlying state criminal prosecution,
4 the instant appeal involves underlying federal civil actions.
5 Despite these distinguishing characteristics, *Imbler* has
6 considerable bearing here.

7 The *Imbler* Court relied heavily upon the common law doctrine of
8 absolute immunity as applied to federal government attorneys to
9 justify application of the same rule in the context of a Section
10 1983 action against state prosecutors. *U.S. at*, 44 U.S.L.W. at
11 4254-55 & n. 21. Moreover, as we stated in *Mark v. Groff, supra*,
12 521 F.2d at 1380:

13 '[We perceive] no significant reason for distinguishing, as fare as
14 the immunity doctrine is concerned between litigation under §
15 1983 against state officer and actions against federal officers
16 alleging violation of constitutional rights under the general federal
17 question statute. In contrast, the practical advantage of having just
18 one federal immunity doctrine for suits arising under federal law
19 is self-evident.'

20 Nor do we see any significant reason to distinguish actions
21 involving civil claims from those involving underlying criminal
22 prosecution. The reasons supporting the doctrine of absolute
23 immunity, *Imbler, U.S. at* 44 U.S.L.W. at 4255-56, apply with
24 equal force regardless of the nature of the underlying action."

25 532 F.2d at 1251.

26 The immunity under state law is identical. *Howard v. Drapkin*, 222 Cal.App. 843
27 (1990). In *Howard v. Drapkin*, the court cited with approval federal cases extending the
28 doctrine of quasi-immunity to various persons connected with the juridical process and
explained:

29 "we are persuaded that the approach of the federal courts is
30 consistant with the relevant policy considerations of attracting an
31 overburdened judicial system the independent and impartial
32 services and expertise upon which that system necessarily
33 depends. Thus, we believe it appropriate that these 'non-judicial
34 persons who fulfill quasi-judicial functions intimately related to
35 the judicial process [citation] should be given absolute quasi-
36 judicial immunity for damage claims arising from their
37 performance of duties in connection with the judicial process.....
38 Additionally, the threat of civil liability may affect the manner in
which they perform their jobs."

Id. at 857.

1 There is no reason to believe that the state courts, if faced with the proposition, would
 2 not extend the immunity to cover government attorneys engaged in the defense of a civil
 3 lawsuit. *Imbler v. Pachtman, supra, Fry v. Melarango, supra.*

4 Accordingly, defendant Bradley A. Solomon is immune from suit as his alleged conduct
 5 was performed in the course of the defense of the Attorney General.

6 III.

7 **DEFENDANT BRADLEY A. SOLOMON IS ENTITLED TO AN** 8 **AWARD OF HIS COSTS AND ATTORNEY'S FEES FOR** 9 **HAVING TO RESPOND TO THIS FRIVOLOUS LAWSUIT**

10 It is "unquestioned that a federal court may award counsel fees to a successful party
 11 when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Ellis v. Cassidy, 625 F.2d 227, 230 (9th Cir. 1980), quoting Hall v. Cole, 412 U.S. 1, 5 (1973).*

12 Congress has specifically authorized district courts, in their discretion, to award "the
 13 prevailing party.... a reasonable attorney's fees as part of the costs" in Civil Rights Act cases
 14 such as this one. 42 U.S.C. § 1988. The Supreme Court declared that a prevailing defendant
 15 may recover fees under Section 1988 if the court finds "the plaintiff's action frivolous,
 16 unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes*
 17 *v. Rowe, 449 U.S. 5, 14 (1980), quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412,*
 18 *421 (1978)* The purpose of awarding attorney's fees to a defendant in a civil rights case is to
 19 deter frivolous and harassing litigation. *Ellis v. Cassidy, supra, 625 F.2d at 230.*

20 The Supreme Court has further instructed the lower courts that "plaintiff's subjective bad
 21 faith" is not a necessary prerequisite to the fee award against him. *Christianburg Garment Co.*
 22 *v. EEOC, 434 U.S. at 421.* The court need only find that plaintiffs' action was objectively
 23 groundless or without foundation, not that plaintiffs, themselves knew it to be without merit or
 24 brought it for an improper reason. *Id.* The current action and allegations against defendant
 25 Bradley A. Solomon, in the first amended complaint clearly meet that standard.

26 Plaintiffs were no doubt aware of the baseless nature of their charges of criminal
 27 conspiracy which they levied against defendant Bradley A. Solomon in this action. The only
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1 apparent motivation for the plaintiffs' bringing this action were to retaliate against the
2 successful efforts of the defendants' attorneys, and in particular, Bradley Solomon's ability to
3 obtain a stipulation to dismiss the Attorney General. Had plaintiffs done any inquiry into the
4 applicable facts and law before filing their case they would have discovered the insufficiency of
5 their civil rights claim. *Margolis v. Ryan*, 140 F.3d 850, 854 (9th Cir. 1998). The Ninth Circuit
6 has found it appropriate to award attorney's fees pursuant to 42 U.S.C. § 1988 when the relief
7 sought is barred by absolute immunity. *Francheschi v. Schwartz*, 57 F.3d 828, 832 (9th Cir.
8 1995).

9 In calculating attorney's fees, the Court must determine: 1) the number of hours the
10 prevailing party reasonably expended; 2) determine the reasonable hourly rate; 3) multiply the
11 number of hours by the hourly rate to determine a "lodestar"; and 4) apply a multiplier where
12 appropriate. *Morales v. City of San Rafael*, 96 F.3d 359, 363-365, n. 8-1 (9th Cir. 1996).
13 Counsel in this action is compelled to file and argue a time-consuming motion to dismiss and
14 this attorney's fees motion, as well as handling the court appearances, correspondence and other
15 matters during the course of this litigation. The total of fourteen hours expended on this motion
16 is very reasonable given the amount of work required to prepare this motion. The \$158 an hour
17 charged by the Attorney General's office is reasonable. The resulting amount of \$2,212 is an
18 appropriate amount of costs and fees to be awarded.

19 CONCLUSION

20 For the foregoing reasons, defendant Bradley A. Solomon respectfully requests that the
21 motion to dismiss be granted with prejudice.

22 Plaintiffs' first amended complaint constitutes a recital of fanciful accusations against
23 defendant. Plaintiffs' allegations are so patently absurd, such as to defy comprehension. Taken
24 as a whole, it can only be concluded that plaintiffs intentionally framed their pleadings in this
25 fashion, for no other purpose than to harass defendant, and the other parties. The ultimate
26 sanction of dismissal and an award of costs is appropriate herein.

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1 Dated: April 16, 2008
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Respectfully submitted,

4 EDMUND G. BROWN JR., Attorney General
5 of the State of California
6 KAY K. YU
Deputy Attorney General

7 By: _____/S/_____
8 KAY K. YU
Attorneys for Defendant Bradley A. Solomon
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Gabor v. United States of America, et al.***
U.S. D.C. Northern Case No.: 5:07-cv-06091 PVT

I declare:

I am employed in the County of San Francisco, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102.

On April 16, 2008, I served the attached:

**NOTICE OF MOTION; MOTION TO DISMISS FIRST AMENDED
COMPLAINT; MOTION FOR AWARD OF COSTS, FEES AND OTHER RELIEF
PURSUANT TO 42 U.S.C. § 1988; MEMORANDUM OF POINTS AND
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by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

**John Gabor and Kay Gabor
590 Smokey Court
Campbell, CA 95008-3717**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 16, 2008, at San Francisco, California.

Anh Ho

Typed Name



Signature